U.S. 542, 548-550 (1963): "The issue on the merits, namely the legality of the union's picketing, is a matter entirely apart from the determination of whether the Georgia court or the National Labor Relations Board should conduct the trial of the issue. The jurisdictional determination here is as final and reviewable as was the District Court's decision in *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541. . .". *See also, Far East Conference* v. *United States*, 342 U.S. 570, 572 (1952). There, this Court granted the extraordinary remedy of common law certiorari to review an interim decision of the District Court declining to defer to the primary jurisdiction of an administrative agency. That decision underscores the extreme importance of immediate review. *And see, United States Alkali Export Association* v. *United States*, 325 U.S. 196, 202-204 (1945), also granting common law certiorari to review a decision of the District Court, prior to trial, which had denied reference of the action to the administrative agency there involved. The analysis of this Court in the *Alkali Association* case is a complete answer to the contentions of Respondents regarding the necessity of immediate review and the degree of injury resulting from denial thereof:

> "[T]he present case is not the ordinary one of hardship resulting from overruling a plea in bar or denying a preliminary motion which, if well founded, would end the litigation on the merits—decisions which Congress, in the absence of other provisions for appeal, must have contemplated would, in the ordinary course, be reviewed on appeal from the final judgment. The questions now presented involve the propriety of the exercise, by the district court, of its equity jurisdiction, and an asserted conflict between its jurisdiction and that of an agency of Congress . . . Exercise of its jurisdiction by the district court would preclude the [Federal Trade] Commission from carrying out its asserted functions of investigation, recommendation and report before any suit by the United States. This would be more than the mere denial of the right of a suitor such as Congress must have contemplated would be cor-

> rected by recourse to the prescribed appeal procedure. *It would be a frustration of the functions which Congress has directed the Commission to perform and of the policy which Congress presumably sought to effectuate by their performance. The hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of the asserted Congressional policy of conferring primary jurisdiction on the Commission, together support the appeal to the discretion of this Court to exercise its power to review the ruling of the district court in advance of final judgment.*" Id. at 203-204. (Emphasis supplied.)

Moreover, the repeated emphasis of Respondents upon "irreparable injury" as a *controlling* criterion is wholly inconsistent with the practical or pragmatic approach to appealability under 28 U.S.C. § 1291 which this Court has adopted. As shown in the instant Petition for Certiorari, pages 11-14, the decisions of this Court require a weighing of the advantages and disadvantages of immediate review, rather than the adoption of rigid verbal formulae such as "irreparable injury." *See Eisen* v. *Carlisle & Jacquelin*, ... U.S. ....., 94 S.Ct. 2140, 2149-2150 (1974), *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152-154 (1964), and *Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542, 548-49 (1963), all stressing the pragmatic advantages of immediate review.

On pages 9 and 10 of their brief, respondents maintain that the order of Judge McGarr, declining to respect the primary jurisdiction of the Comptroller of the Currency, is not "fundamental" to these cases. The theory is that because the complaints in these cases raise garden variety allegations of fiduciary "imprudence" as well as the charge of "conflict of interest," any failure to stay proceedings pending resolution of the "conflict" charge is not sufficiently basic or fundamental to be reviewed. That, however, ignores the fact that failure to refer these cases to the Comptroller for initial decision will focus discovery in the wrong forum; that the doctrine of primary jurisdiction re-

quires stay of proceedings in the District Court while the agency acts; that the District Court, by rejecting the aid implicit in the views of the Comptroller, will in fact complicate and protract this litigation; and that proceeding without the opinion of the Comptroller will infect with reversible error any decision ultimately reached by the District Court on the question of "conflict of interest."

On pages 10-13 of their brief, Respondents argue that the decision of the District Court, erroneously declining to refer these cases to the Comptroller for initial decision, is not separable from the merits of the controversy. That argument, however, is flatly refuted by *Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542, 548-550 (1963), which held that the decision to proceed in a judicial, rather than an administrative forum, is "collateral" to the merits of the cause of action within the meaning of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). The argument is also rejected by *Far East Conference* v. *United States*, 342 U.S. 570, 572 (1952), which granted interim review of an order of the District Court refusing to uphold the primary jurisdiction of the agency there involved. In the *Far East* case, as in *Curry*, the decision involved was separable from the merits of the litigation and it could be effectively reviewed on an immediate basis. It follows, therefore, that the Court of Appeals for the Second Circuit correctly determined that decisions under the doctrine of primary jurisdiction are collateral to the merits of the underlying litigation in *C.A.B.* v. *Aeromatic Travel Corp.*, 489 F.2d 251, 253 (2nd Cir. 1974), and that the Court of Appeals for the Seventh Circuit, in *Thill Securities Corp.* v. *New York Stock Exchange*, 469 F.2d 14, 16 (7th Cir. 1972) and in the instant cases (which adopted the *Thill* approach), has misapplied the concept of "collateral" order.*

*On pages 10 and 11 of their brief, Respondents propose that an order is "collateral" only if a reversal on appeal following a judgment on the merits would leave the order untouched. This formulation is announced *ex cathedra;* not a single authority is cited in its support.

[*Footnote continued on next page.*]

On pages 12-13 of their brief, Respondents contend that the case of *Local 438 Construction and General Laborers' Union* v. *Curry*, 371 U.S. 542 (1963), is not relevant to this petition. In this regard, Respondents have sought to cultivate insignificant factual distinctions—distinctions which do not amount to differences in legal principle. It is of course obvious that the Court in *Curry* had before it an "exclusive," rather than "primary," jurisdiction ruling of the lower court. However, that fact has no bearing whatsoever on the question whether the preliminary routing decision is separable from and collateral to the merits of the controversy. Nor does that fact have any bearing on the question whether the regulatory authority of the agency is of such importance that review of decisions impairing it must be promptly had. Furthermore, it is worthwhile to recall that the doctrine of primary jurisdiction is a corollary of the doctrine of exclusive jurisdiction; that the primary jurisdiction decisions of this Court are predicated on earlier exclusive jurisdiction precedents; and that both the primary and exclusive jurisdiction doctrines subserve parallel policies in our federal system.

On page 13 of their brief, Respondents assert that decisions of this Court construing the expression "final judgments or decrees" in 28 U.S.C. § 1257 are of no utility in construing the expression "final decisions" in 28 U.S.C. § 1291. However, it is too elementary for extended discussion that provisions in the same enactment (the federal judicial code) are to be construed *in pari materia*. That is not to say, of course, that decisions construing the finality requirement under 28 U.S.C. § 1257 are

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The test of "collateralness" or separability enunciated by this Court, contrary to that espoused by Respondents, is summarized in *Eisen* v. *Carlisle & Jacquelin*, ...U.S. ....., 94 S.Ct. 2140, 2150 (1974), and *Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542, 548-49 (1963). The issue is whether the order resolves a right which is an ingredient in the cause of action on the merits and whether, therefore, the order cannot be effectively reviewed until the merits are entirely adjudged. Applying this standard, it is plain that the order appealed from herein is not a resolution of a right which is an ingredient in the cause on the merits, and it is equally plain that effective review may be presently had.

"controlling" in construing the finality requirement under 28 U.S.C. § 1291. It may be conceded that they are not "controlling;" instead, they are highly instructive and provide sound guidance. The decisions of this Court make that quite clear. *See e.g., Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542, 548-549 (1963), looking to decisions under 28 U.S.C. § 1291 for guidance in construing 28 U.S.C. § 1257. *See also, Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152-154 (1964).

Lastly, on pages 13-15 of their brief, respondents argue that there is no conflict between the positions of the Second and Seventh Circuits on the appealability point before this Court. However, the position of the Second Circuit, taken in *C. A. B.* v. *Aeromatic Travel Corp.*, 489 F. 2d 251, 253 (2nd Cir. 1974), is an adoption of the approach of this Court and a rejection of the position of the Seventh Circuit. In the *Aeromatic* case, the Second Circuit concluded that threshold decisions under the primary jurisdiction doctrine regarding the proper routing of litigation were collateral orders; the Seventh Circuit, in *Thill Securities Corp.* v. *New York Stock Exchange*, 469 F. 2d 14, 16 (7th Cir. 1972), reached precisely the opposite conclusion. In the *Aeromatic* case, the Second Circuit concluded that the importance of the primary jurisdiction ruling to the proper functioning of the federal regulatory system was sufficient to warrant immediate review; in the *Thill* case, as in the present cases, the Seventh Circuit did not attach sufficient importance to this factor to grant immediate review. Although there are circumstantial differences between the Second and Seventh Circuit cases, these differences cannot blur the plain fact that the Seventh and Second Circuits are embarked on fundamentally opposed analyses in assessing the appealability of primary jurisdiction reference orders, and that the Second Circuit, unlike the Seventh, had adopted a "practical" rather than a rigid or technical analysis as required by the decisions of this Court.

CONCLUSION.

For the reasons stated above, and in the Petition for Certiorari filed on November 21, 1974, a writ of certiorari should be granted in these six cases.

Respectfully submitted,

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